

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 12 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

ROBERT L. BOUCONI,	)	2 CA-CV 2009-0092
	)	DEPARTMENT A
Plaintiff/Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
RANDALL A. NEIS,	)	Appellate Procedure
	)	
Defendant/Appellee.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200802241

Honorable Gilberto V. Figueroa, Judge

REVERSED

Robert L. Bouconi

Florence  
In Propria Persona

Stinson Brown  
By William G. Stinson

Glendale  
Attorneys for Defendant/Appellee

H O W A R D, Chief Judge.

¶1 Appellant Robert Bouconi appeals from the trial court's grant of summary judgment to appellee Randall Neis. Bouconi argues the court erred in determining he had failed to present sufficient evidence of a foreseeable and unreasonable risk to demonstrate

a triable question of material fact. He also contends the court erred in neglecting to rule on additional issues he had presented in his opposition to Neis's motion for summary judgment. For the reasons that follow, we reverse.

### **Facts and Procedural Background**

¶2 We view the facts and reasonable inferences from those facts in the light most favorable to the party against whom summary judgment was granted. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). In August 2006, Bouconi, who is an amputee, went to Neis's home to discuss a real estate transaction. Neis's labrador retriever was present during Bouconi's visit, and a neighbor and his two labrador retrievers were also in the home. All three dogs frolicked and played together, running from the living room to the kitchen and back. Neis had previously informed Bouconi that his dog often would push into people and stated that, if the dog pushed into Bouconi during the visit, Bouconi should push the dog away.

¶3 As Bouconi attempted to enter Neis's bathroom, Neis's dog pushed past him and caused him to fall. Bouconi sued Neis, claiming that Neis had been negligent in failing to control his dog and that Bouconi had suffered "severe injuries" as a result of Neis's negligence. Neis moved for summary judgment, contending Bouconi had failed to present evidence that the dog posed an "unreasonable" and foreseeable risk of harm. The trial court agreed and granted Neis's motion. Bouconi appeals from that ruling.

### **Discussion**

¶4 Bouconi argues the trial court erred by granting summary judgment based on its finding that he had not presented sufficient evidence of the foreseeability and

unreasonableness of the risk posed by Neis's dog.<sup>1</sup> We review a grant of summary judgment de novo. *Valder Law Offices v. Keenan Law Firm*, 212 Ariz. 244, ¶ 14, 129 P.3d 966, 971 (App. 2006). And summary judgment is required when there is "no genuine issue as to any material fact." Ariz. R. Civ. P. 56(c)(1).

¶5 To maintain a negligence action, a plaintiff must show that the defendant owed a duty to the plaintiff, the breach of which caused the plaintiff's injury. *See Morris v. Ortiz*, 103 Ariz. 119, 121, 437 P.2d 652, 654 (1968). Neis owed "a duty . . . to protect [Bouconi] against foreseeable and unreasonable risks of harm" because Bouconi was an invitee on his property.<sup>2</sup> *Bellezzo v. State*, 174 Ariz. 548, 550-51, 851 P.2d 847, 849-50 (App. 1992). A condition on Neis's property posed a foreseeable and unreasonable risk to Bouconi if Neis should have anticipated harm from the condition. *See Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982).

¶6 Foreseeability and reasonableness of a risk are not relevant in determining the existence of a duty but, rather, bear on whether the standard of care was breached. *See Gipson v. Kasey*, 214 Ariz. 141, ¶¶ 15-17, 150 P.3d 228, 231 (2007) ("[F]oreseeability is not a factor to be considered by courts when making determinations of duty . . . . [But it] often determines whether a defendant acted reasonably under the circumstances."); *Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 189 Ariz. 206, 211, 941 P.2d 218, 223 (1997) ("The type of foreseeable danger . . . dictate[s] . . . the

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<sup>1</sup>He also contends the trial court erred in failing to rule on additional issues he claims he introduced in his opposition to Neis's motion for summary judgment. We need not reach this argument, however, in view of our resolution of this appeal, *infra*.

<sup>2</sup>For the purpose of summary judgment, Neis conceded Bouconi was an invitee.

nature and extent of the conduct necessary to fulfill the duty.”); *Bellezzo*, 174 Ariz. at 551, 851 P.2d at 850 (unreasonable risk part of determining breach). Although breach of a duty is usually a question for the trier of fact, *Gipson*, 214 Ariz. 141, ¶ 9, 150 P.3d at 230, summary judgment is appropriate nonetheless “if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see also Gipson*, 214 Ariz. 141, n.1, 150 P.3d at 230 n.1.

¶7 Here, Bouconi presented evidence that Neis had advised him that his dog had a habit of pushing up against people. Neis later put the dogs outside, at Bouconi’s request, because Bouconi had been concerned about their rambunctious behavior, running back and forth between the kitchen and the living room. Due to the weather, however, Neis chose to bring the dogs back inside prior to the accident. But Bouconi was under the impression that the dogs would be controlled in the house.

¶8 Although the trial court found there was no evidence that the dogs were being unreasonably rowdy just before the accident, Bouconi testified in a deposition that two of the dogs had “zoomed by” him as he was on his way to the bathroom. Further, testimony was presented that Neis knew Bouconi was an amputee with a prosthetic leg and walked with a limp—a condition a jury could find would make Bouconi more susceptible to injury from a large, rambunctious dog. In light of this evidence, a reasonable juror could find that Neis had breached the duty he owed to Bouconi as his invitee because the injury-causing accident was foreseeable and posed an unreasonable

risk to Bouconi. Thus, Bouconi raised a genuine issue of material fact that should have been left for a jury to decide.<sup>3</sup>

### Conclusion

¶9 Because we conclude that a genuine issue of material fact exists, we reverse the trial court's grant of summary judgment in favor of Neis.

*/s/ Joseph W. Howard*  
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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

*/s/ Philip G. Espinosa*  
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PHILIP G. ESPINOSA, Presiding Judge

*/s/ Garye L. Vásquez*  
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GARYE L. VÁSQUEZ, Judge

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<sup>3</sup>We confine ourselves to the issues argued by the parties. We do not address issues not fully developed here or below.